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In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., AND SUMMIT WOMEN'S HEALTH ORGANIZATION, INC.,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT TIMOTHY MURPHY

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Second Amended RICO Complaint, alleging extortion against protesters, properly dismissed, where the designated "enterprise" and the alleged "racketeering activity" had a political or social, but not a commercial, dimension?

2. Was the Complaint properly dismissed after nearly five years of litigation and discovery, where the Complaint and the RICO Case Statement showed that a RICO claim or conspiracy had not been specifically alleged?

3. Was the Complaint properly dismissed where Petitioners lacked standing to pursue their RICO claims against Respondents and failed to allege Hobbs Act extortion or any other predicate acts under RICO?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fed. R. Civ. P. 12(b), in pertinent part, provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Other statutory provisions are reproduced in Petitioners' Brief (Pet. Br. at 1-3).

STATEMENT OF THE CASE[1]

In June, 1986, Petitioners filed a one-count Complaint under the federal antitrust laws (15 U.S.C. §§1, 26) in the District of Delaware against certain Respondents and other Defendants (No. 86 C 263).[2] The suit was voluntarily dismissed. Petitioners refiled their Complaint in the

[1] Respondent generally adopts the Statement of the Case of Respondents Scheidler, *et al.*, in their Brief.

[2] Plaintiffs originally consisted of the National Organization for Women, the Delaware Women's Health Organization

Northern District of Illinois on October 17, 1986, seeking nationwide declaratory and injunctive relief (No. 86 C 7888). For almost five years, Petitioners pursued extensive discovery, reviewing hundreds of tapes, files and letters of the Respondents and many others. More than a dozen depositions were taken before Petitioners filed their RICO Case Statement in March, 1991 (R.469).

Petitioners filed their First Amended Complaint on February 2, 1989, which added alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962, and prayers for treble damages (R.155). The First Amended Complaint also added new defendants, including Respondent herein, Randall Terry, Andrew Scholberg, and Vital-Med Laboratories, new conspiracies, and three new pendent state theories of recovery. The conspiracy allegations were so broadly drawn that Petitioners later claimed in their RICO Case Statement that they embraced hundreds or even thousands of co-conspirators (¶3; J.A. 89).

Petitioners filed their Second Amended Complaint on September 22, 1989 ("Complaint") (R.236). Petitioners

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("DWHO"), and the Ladies Center of Pensacola. The Ladies Center was dismissed from the case. Petitioner Summit Women's Health Organization ("SWHO") was added in the first amended complaint. For purposes of brevity, Respondent refers to the Plaintiffs as the Petitioners throughout this Brief.

Joseph M. Scheidler and the Pro-Life Action League, Inc. were among the original defendants. Respondent Murphy and Andrew Scholberg were added as defendants in the first amended complaint. For purposes of brevity, throughout this brief "Respondent" refers to Timothy Murphy, unless otherwise specifically indicated.

alleged that Respondents conspired to "drive every clinic in the United States . . . out of business" (¶26) and that they had allegedly engaged in "unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers. . . . " (¶27) They also alleged that Respondent, other Defendants, and one or more employees of Defendant Vital-Med, "conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois," stole some 4,000 specimens over a period of 10 months, and conspired to "use the specimens as part of their drive to disrupt the operations of health clinics generally" in a media campaign. (¶¶64-73) Among the uses alleged were "actions designed to intimidate and harass clinics by focusing attention on the stolen specimens," including "highly publicized" funeral masses and burials. (¶¶37, 64-78) Petitioners alleged that the purpose of Respondents' actions was "to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant." (¶85) Petitioners asked for broad declaratory relief "that the actions of" Respondents "have violated the rights of" the clinics and their patients to be free of restraints of trade and for equally broad injunctive relief to prohibit Respondents from allegedly "carrying out a concerted effort to drive women's health centers . . . out of business" and from "using unlawful means to drive women's health centers . . . out of business." (¶¶79-93)

Count II, a RICO §1962(a) claim, was brought only by the abortion clinics – Delaware Women's Health Organization, Inc., and Summit Women's Health Organization – as class actions (no class was ever certified). Petitioners

alleged that Respondents formed enterprises "with common purposes, including driving all clinics that provide abortion services out of business." (¶¶95-96) The sole RICO predicate act alleged was Hobbs Act extortion (18 U.S.C. §1951). In each instance, Petitioners alleged only that clinic employees, physicians, and patients had "to give up" their jobs, their medical practice or their constitutional rights. (¶¶97-98) Petitioners never alleged that any Defendant, or co-conspirator linked to Respondents, obtained, or attempted to obtain, any property from any clinic, doctor, or patient.

Counts III and IV were RICO §1962(c) and (d) claims. Petitioners alleged that Respondents and other Defendants were associated with one of the enterprises, Pro-Life Action Network (PLAN), and "participated in PLAN's affairs through a pattern of racketeering activity" (¶109), namely, the Hobbs Act extortion alleged in ¶¶97-98. Petitioners alleged that Respondents engaged in a conspiracy to "use the income they received from a pattern of racketeering activity . . . to establish or operate PLAN" and "agreed to the commission of the extortionate acts from which the above-mentioned income would derive" (¶¶112-113). The remaining counts alleged pendent state causes of action.

On August 29, 1990, Respondents filed a Motion to Dismiss the Second Amended Complaint under Fed. Rules of Civ. Pro. ("FRCP") 12(b)(6) or, in the alternative, for a more definite statement under FRCP 12(e) (R.335). Respondents also made a motion to require Petitioners to file a RICO Case Statement under FRCP 16 (R.360).

On February 4, 1991, the District Court, "to establish a[n] efficient procedure [to] process" the RICO claim, ordered Petitioners to file a RICO Case Statement. The Court ordered Petitioners to "include the facts the plaintiffs [were] relying upon to initiate each RICO claim as a result of the 'reasonable inquiry' required by Fed. R. Civ. P. 11" (introductory ¶; J.A. 81-82; R.430). "In particular. . . . [the] statement . . . [had to] state in detail and with specificity" answers to twenty questions. (*Id.*)

On March 18, 1991, Petitioners filed their RICO Case Statement. It included 29 pages of text and two appendices of 41 and 36 pages, respectively. The RICO Case Statement cited and relied on discovery depositions (¶5(d); J.A. 92-93), discovery documents (¶6(2) n.5; J.A. 103), and trial testimony from other proceedings (¶6(3); J.A. 105).

While the Complaint itself alleged sporadic acts of trespass, vandalism, assault, battery, and theft by Respondents, other Defendants, or unnamed co-conspirators (¶¶2, 27, 40, 42, 46-50, 55, 60, 61, 64, 67, 74, 97-98), it never even mentioned "bombing" or "arson" by any Respondent, other Defendants, or their "co-conspirators." The RICO Case Statement, for the first time, referred to "bombing" or "arson" but only as part of "the pattern of extortionate acts." (¶2; J.A. 88) However, Petitioners did not "list the specific [federal or state extortion, bombing, or arson] statutes which were allegedly violated," as required by the Order of February 4, 1991.[3] Instead, Petitioners characterized these acts only as "violat[ions] of

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[3] Under federal law, "bombing" or "arson" are not "racketeering activity" under 18 U.S.C. §1961. "Arson" in violation of

the Hobbs Act, 18 U.S.C. §1951." (¶¶5(a), (p), J.A. 91, 95-97)[4] Neither the Complaint nor the RICO Case Statement alleges facts to indicate "in detail and with specificity" what the plaintiffs "reli[ed] upon to initiate" their "RICO claim" or alleges individual conduct by any Respondent involving acts of "bombing" or "arson" – or their agreement to such acts as part of a conspiracy – as required by the Order of February 4, 1991.

Two months later, on May 28, 1991, the District Court, expressly relying on the allegations set out in the RICO Case Statement, granted Respondents' Motion to Dismiss, holding that Petitioners failed to state a claim under either the antitrust laws or RICO. The Court then dismissed the case in its entirety. 765 F. Supp. 937, 941. While Petitioners described their investigation as "continu[ing]" and "incomplete" (¶2 n.1; J.A. 88) in the RICO Case Statement and offered "to satisfy any request . . . [for] additional information" (¶20; J.A. 116), they did not seek to open the judgment under FRCP 59(e) or FRCP 60, or request a continuance under FRCP 56(f) to conduct additional discovery by taking depositions, specifying the evidence that might be obtained and how it would demonstrate that a genuine issue of fact existed. Instead, Petitioners immediately appealed the dismissal to the Court of Appeals.

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state law is a "racketeering activity." *Id.* "Bombing" is not a predicate state offense under "racketeering activity." *Id.*

[4] The Government's suggestion that Petitioners pled "arson" or "bombing" as independent predicate acts (Gov. Br. 3, 21-22), therefore, misreads the District Court's Order of February 4, 1991, and the RICO Case Statement.

The Court of Appeals unanimously affirmed. 968 F.2d 612. Petitioners filed a petition for rehearing, which was denied on August 4, 1992. (Pet. App. G-2) Petitioners filed a petition for certiorari on November 2, 1992. On June 14, 1993, this Court granted certiorari limited to Question 1 (the RICO question). 113 S.Ct. 2958 (1993).

SUMMARY OF THE ARGUMENT

For the reasons set forth in the Briefs of Respondents Scheidler *et al.*, and Terry *et al.*, Petitioners' RICO complaint was properly dismissed under common standards of civil procedure. Petitioners failed to allege that Respondents had any motive of commercial gain, an essential element of a RICO claim under the *Ivic-Bagaric* rule. Moreover, Petitioners failed to plead any Hobbs Act extortion because they never alleged that Respondents "obtained" or "attempted to obtain" any property from Petitioners. *United States v. Evans*, 112 S.Ct. 1881 (1992).

In addition, dismissal was justified under heightened pleading standards because of the impact on First Amendment freedoms. Petitioners' essential claim is that social protest – of any kind – against abortion clinics constitutes "extortion" under RICO. That claim clearly impinges upon First Amendment freedoms (*NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)), and was therefore subject to heightened pleading requirements (*Franchise Realty v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)). Because Petitioners' failed to satisfy such standards, their complaint was properly dismissed.

In dismissing Petitioners' complaint, the District Court was also justified in requesting and relying upon Petitioners' RICO Case Statement. RICO Case Statements are appropriate tools of judicial administration under FRCP 11, FRCP 12(e), FRCP 16, and FRCP 56 to manage RICO cases and to prevent nonmeritorious claims from proceeding to trial. Many circuit courts have expressly approved the use of RICO Case Statements, and federal courts in virtually all circuits use them.

Finally, the District Court in this case was justified in disposing of this case under FRCP 56, and affirmance on that ground, in the alternative, is justified. When Petitioners submitted their RICO Case Statement, they cited and relied upon discovery and deposition materials outside the pleadings. As a result, the District Court could have converted Respondents' Motion to Dismiss into a motion for summary judgment under FRCP 56 and dismissed the complaint with prejudice.

ARGUMENT

I. THIS RICO ACTION WAS PROPERLY DISMISSED UNDER FRCP 12(b)(6) OR FRCP 56 AFTER NEARLY FIVE YEARS OF LITIGATION AND DISCOVERY BECAUSE PETITIONERS FAILED TO PLEAD ANY RICO VIOLATION WITH THE PRECISION REQUIRED WHEN A RICO CLAIM IMPINGES UPON A BROAD RANGE OF POLITICAL OR SOCIAL ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

Petitioners' failure to plead a commercial dimension to Respondents' conduct allegedly in violation of RICO

was sufficient to warrant dismissal of their claim for relief with prejudice.[5] However, dismissal was also warranted on additional grounds.[6] Petitioners also failed to distinguish with precision in their Complaint or their RICO Case Statement that aspect of Respondents' conduct which was *unprotected* under the First Amendment, and *illegal* under RICO. On the face of the complaint, some aspects of Respondents' conduct were manifestly protected under the First Amendment. Petitioners had to distinguish those aspects from Respondents' unprotected conduct that constituted extortion under the Hobbs Act (18 U.S.C. §1951) or, through actions of alleged co-conspirators, that constituted other "racketeering activity"

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[5] For purposes of brevity, Respondent adopts the arguments of Respondents Terry *et al.*, that extortion under the Hobbs Act (18 U.S.C. §1951) was not pled in the Complaint or in the RICO Case Statement by Petitioners, since Respondents did not "obtain the property" of Petitioners. Similarly, Respondent adopts the arguments of Respondents Terry *et al.*, on the issue of Article III and RICO standing, the arguments of Respondent Migliorino on the First Amendment, and the arguments of Respondents Scheidler *et al.*, on the absence of any commercial dimension.

[6] Respondents "may rely upon any matter appearing in the record in support of the judgment below," *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982), "whether or not the ground was relied upon or even considered by the trial court," *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970), or even if their "argument[s] may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Id.* Indeed, " '[i]n the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' " *Brown v. Allen*, 344 U.S. 443, 459 (1953) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

under RICO.[7] The failure to make this crucial distinction was fatal to their claim for relief. Accordingly, Petitioners' claim for relief was properly dismissed with prejudice.

A. A Heightened Specificity in Pleading Was Required Where First Amendment Rights of Speech and Association were Impacted.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a local chapter of the NAACP organized a boycott of white merchants and enforced the boycott by several means, including a number of acts of violence directed primarily at blacks not honoring the boycott, such as the firing of gunshots into their homes (on at least three occasions), slashing of tires, throwing a brick through a windshield of a car, stealing whiskey purchased from a white merchant, and placing threatening phone calls. 458 U.S. at 902-06. This Court unanimously dismissed overbroad conspiracy judgments against civil rights boycotters and demonstrators. This Court held:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that

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[7] The Government recognizes that Petitioners did not allege more than "extortion" in their Complaint; it seeks to use the RICO Case Statements to fill in that defect (Gov. Br. 3, 21). The defect, however, is not remedied if Respondents are not tied to the new statements of fact, as they are not.

> the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. "In this sensitive field, the state may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

Id. at 920 (citations omitted). The First Amendment, the Court stated, requires "precision of regulation." *Id.* at 921.

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts.

Id. at 933. Here, no such allegations – characterized by "precision" – of a RICO violation by Respondents, or conspiracies to do so by Respondents, or anyone else with whom they might be concretely linked, are contained in the Complaint or in the statement of allegations that had to be in the RICO Case Statement under the District Court's Order of February 4, 1991. Nor is the relief sought narrowly tailored. This litigation was, therefore, rightly terminated with prejudice.

First Amendment expression permeates the activities of Respondents. Petitioners attempt to portray Respondents as forming one monolithic entity, engaged in one common activity ("trespass, extortion, and vandalism"); the truth is that Respondents have used many different methods and widely diverse styles to communicate to the public, opinion makers, and law makers their opposition to the abortion policy of this country.

The centerpiece of the Complaint is Respondent Scheidler's manual on protest activities, *Closed: 99 Ways to Stop Abortion* (1985). (¶¶28-29, 77; R.109) Contrary to the central teaching of this Court about the First Amendment, this litigation is, in many ways, about suppressing that book and the ideas that it embodies. The protected First Amendment activities alleged in the Complaint, many of which are described in the book, include sidewalk counseling, picketing, press conferences, leafletting, demonstrations and counter-demonstrations, "blitzes," rallies, marches, advertising, burials of dead unborn children and religious services, blockades, and sit-ins. (¶¶2, 11, 35, 38, 40, 48-50, 55-56, 59-60, 73, 98(j), 125) Many of these activities are clearly within the ambit of the protection of the First Amendment.[8]

The Court of Appeals' comment that "the complaint does not attempt to bar all anti-abortion activities" ignored the sweep of the Complaint on its face and in its

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[8] *See, e.g., DeBartolo v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575-76 (1988) (union's hand-billing against businesses in shopping mall); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987) (verbal challenges to activities of another); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (leafletting against discriminatory real estate practices); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (gathering to march, sing, and chant); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (proselytizing in public places); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (distribution of literature). Legislation that would attempt to regulate such activities would have to be "narrowly tailored" as to time, place and manner. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Petitioners' Complaint and RICO Case Statement must be measured against similar exacting standards, if the values behind the First Amendment are to be vindicated.

prayers for relief. 968 F.2d at 616. It also ignored entirely Petitioners' RICO Case Statement. Indeed, the Complaint and the RICO Case Statement are directed indiscriminately at the Respondents' "actions"; they are thus unconstitutionally overbroad, an overbreadth that cannot be squared with the sensitivity of analysis demanded by the First Amendment.

Respondent does not contend that "violence, criminal trespass, and vandalism are protected by the First Amendment." *Id.* at 621. They are not. Nevertheless, the Complaint, when read in light of the facts (or lack of facts) set out in the RICO Case Statement, was properly dismissed because Petitioners failed to make any distinction between legal or illegal activity, when they sought injunctive relief indiscriminately aimed at preventing Respondents *"from carrying out a concerted effort* to drive women's health centers . . . out of business." ¶93 (emphasis supplied). As this Court pointed out in *Claiborne Hardware*, "the term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies." 458 U.S. at 888. *See also*, Complaint ¶¶1, 26, 41. Similarly, Respondents were indiscriminately alleged to have committed "extortion" merely because their activity may have dissuaded women from having abortions, deterred women from soliciting abortion clinics, or induced personnel to stop performing abortions. (¶98(d)) Petitioners' Complaint, therefore, inappropriately seeks to make criminal the natural consequences of activity protected by the First Amendment, that is, that access to abortions is curtailed by the picketing or leafletting itself, even though such curtailed access stems from a change in policy or the persuasion

affected by such protected activity. The adoption by this Court of Petitioners' argument would be a radical change in First Amendment theory.

The allegations of damage, and the declaratory relief sought, were also broadly and indiscriminately aimed at suppressing "the actions" of the Respondents. (¶¶83-93) These "actions" were deemed illegal because they allegedly invoked "fear" or "intimidation" among patients or clinic personnel. (¶97) But this Court is justifiably wary of allowing speech to be censored on the basis of the perceived reaction of its audience. *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Cohen v. California*, 403 U.S. 15, 21-22 (1971). The RICO allegations, in the Complaint and as amplified by the RICO Case Statement, similarly diffusely referenced Respondents' "activities." (¶105) Likewise, one of the pendent state claims was vaguely directed at "the unlawful acts described above." (¶117) Petitioners assert that the objective of driving abortion clinics out of business is per se illegal. (¶93) The use of protest to influence merchants and their business is, however, squarely protected by the First Amendment.[9] Petitioners charged that Respondents created an "intimidating" climate outside of abortion clinics. (¶¶56, 91, 97-98) Nevertheless, to the degree that such atmosphere around the clinics was caused by picketing and

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[9] *DeBartolo v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 576 (1988) (union handbilling against businesses in shopping mall); *NAACP v. Claiborne Hardware*, 458 U.S. at 910 (boycott of merchants); *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (picketing intended "to induce the customers not to patronize the employer.").

handbilling, such conduct is squarely protected by the First Amendment.[10] "[S]peech does not lose its protected character simply because it may embarrass others or coerce them into action."[11]

The allegations of conspiracy touching on First Amendment speech and association for political and social purposes also require heightened pleading. Petitioners charged that Respondents were part of a "conspiracy" to shut down abortion businesses. But the claim is based on conclusory allegations against Respondents, unsupported by facts, despite the District Court's Order of February 4, 1991, requiring the filing of a RICO Case

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[10] *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Cox v. Louisiana*, 379 U.S. 536, 552 (1965).

[11] *Claiborne Hardware*, 458 U.S. at 910. *See also, id.* at 921 ("[t]o the extent that the lower court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment"); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[t]he claim that the expressions were intended to exercise a coercive impact on respondent [a realtor] does not remove them from the reach of the First Amendment."); *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[t]he language of the political area . . . is often vituperative, abusive, and inexact"); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) (" 'a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger' ") (citations omitted); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open").

Statement. A charge of conspiracy, especially in complex RICO litigation, properly requires a factual basis. The decisions uniformly provide that conclusory allegations of conspiracy do not state a claim for relief.[12]

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[12] *See, e.g., Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 352 (7th Cir. 1992) (RICO) (complaint is deficient where conspiracy facts are not pled); *Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134, 1140 (5th Cir. 1992) (RICO) (the conspiracy allegations were deficient; "the complaint [did] not allege facts implying any agreement"); *Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir. 1991) (RICO) (the "complaint alleges no facts to support an allegation of agreement and knowledge"; the conspiracy count is deficient); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991) (RICO) (the conspiracy claim is deficient; it was "perfunctory" "alleged in wholly conclusory terms"; it failed to "provide any specifics as to the details of the alleged conspiracy"); *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1232 (D.C. Cir. 1991) (RICO) (failure to allege elements of conspiracy and facts supporting allegations rendered complaint deficient); *Craighead v. E.F. Hutton & Co. Inc.*, 899 F.2d 485, 495 (6th Cir. 1990) (RICO) (complaint deficient; plaintiffs only pled the "conclusory allegation that the defendants 'conspired' "); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (RICO) (conspiracy claim is deficient; "it does not allege facts implying agreement"); *O'Malley v. O'Neill*, 887 F.2d 1557, 1560 (11th Cir. 1989) (RICO) ("[t]he plaintiffs' complaint and RICO Case Statement allege at most that some of the defendants knew about O'Neill's activities; there are no facts alleged that would indicate that they were willing participants in a conspiracy"), *cert. denied*, 496 U.S. 926 (1990); *Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1546 (D. Colo. 1990) (RICO) ("a plaintiff must . . . provide some factual basis for a claim that a defendant conspired with another"); *First National Bank of Louisville v. Lustig*, 727 F. Supp. 276, 282 (E.D. La. 1989) (RICO) ("the complaint and RICO Case Statement contain no allegations that First Financial agreed, with co-conspirators or with anyone else, to the commission of two predicate acts").

"[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1968). Even if Petitioners could charge that a particular alleged co-conspirator had engaged in RICO cognizable conduct, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908, 925 n.68.[13] Barefaced and undifferentiated assertions of conspiracy, unaccompanied by the flesh and bone of fact, cannot be squared with the "precision of regulation" required by *Claiborne Hardware*. Here the District Court properly exercised its "power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[14] Petitioners did not meet this standard in their Complaint. They could not meet the standard in the statement of facts required to be filed in their RICO Case Statement, despite years of far-reaching and highly intrusive discovery. Accordingly, the

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[13] Petitioners abuse the "chameleon-like" character of conspiracy law that Justice Jackson so ably criticized in *Krulewitch v. United States*, 336 U.S. 440, 447-49 (1949), and they should not be allowed to persist in their indiscriminate labeling of Respondents when the Complaint and the RICO Case Statement squarely touch First Amendment activity.

[14] *Associated General Contractors of Cal v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (antitrust).

District Court rightly terminated this litigation on the merits.

Because the Complaint and the RICO Case Statement touch clear First Amendment activity, the allegations and assertions of fact in them must be tested by a heightened requirement of precision – a burden that Petitioners did not and could not sustain. Courts in nearly all circuits have adopted the rule of *Franchise Realty v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977):

> [I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Id. at 1082-83.[15] This Court "has consistently recognized the sensitivity of First Amendment guarantees to the

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[15] Courts in all but two circuits (the Fourth and the Eleventh) have adopted the *Franchise Realty* standard. *D.C.: Federal Prescription Service, Inc. v. Amer. Pharm. Assoc.*, 471 F. Supp. 126, 129 (D. D.C. 1979); *First: Cash Energy, Inc. v. Weimer*, 768 F. Supp. 892, 899 (D. Mass. 1991); *Second: Caplan v. American Baby Inc.*, 582 F. Supp. 869, 871 (S.D.N.Y. 1984) (copyright and trademark); *Third: WIXT Television v. Meredith Corp.*, 506 F. Supp. 1003, 1035 (N.D.N.Y. 1980); *City of Newark v. Delmarva Power & Light*, 497 F. Supp. 323, 326-27 (D. Del. 1980); *Realco Services, Inc. v. Holt*, 479 F. Supp. 880, 884 (E.D. Pa. 1979); *Miller & Son Pav. Co. v. Wrightstown Tp. Civ. Assn.*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975); *Fifth: Spanish Intern. v. Leibowitz*, 608 F. Supp. 178, 182-84 (S.D. Fla. 1985); *St. Joseph's Hospital v. Hosp. Auth. of America*, 620 F.

threat of harassing litigation, and has erected safeguards for those guarantees." *Franchise Realty*, 542 F.2d at 1082. *See generally*, P. Areeda, *Antitrust Law* ¶203.4b (1982 Supp.). Likewise, the lower courts uniformly conclude "that the cost to society of permitting some unprotected speech to go unpunished . . . [is] outweighed by the danger that protected speech might be deterred by an overly broad prohibition." *Herzbrun v. Milwaukee County*, 504 F.2d 1189, 1197 (7th Cir. 1974) (Stevens, J., concurring). Petitioners here attempt exactly what *Claiborne Hardware* said cannot be done: Respondents' collective efforts "cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." 458 U.S. at 933. Because RICO and the antitrust laws are *in pari materia*, the rule in *Franchise Realty* applies to RICO as well.

B. The District Court Properly Ordered and Relied Upon the RICO Case Statement in Dismissing the Complaint.

By August, 1990, this litigation appeared interminable. Petitioners had conducted nearly four years of

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Supp. 814, 833 & n.22 (D. Ga. 1975); *City of Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1266-67 (S.D. Fla. 1980). *Sixth: Letica Corp. v. Sweetheart Cup Co., Inc.*, 790 F. Supp. 702, 705-06 (E.D. Mich. 1992); *Seventh: Premier Elec. Cons. Co. v. Int'l Brotherhood of Electrical Workers*, 627 F. Supp. 957, 966 (N.D. Ill. 1985); *Eighth: Mark Aero Inc. v. Transworld Airlines*, 580 F.2d 288, 297 (8th Cir. 1978); *Ninth: Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991); *Tenth: Hydro-Tech. Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982).

discovery, and they were on their Second Amended Complaint. Respondents, however, had yet to be informed – with precision – of the scope of Petitioners' wide-ranging claims for relief. Arguing that the First Amendment in the context of Petitioners' open-ended conspiracy allegations required more precision, Respondents requested the District Court to order a more definite statement under FRCP 12(e) (R.335), or the filing of a RICO Case Statement under FRCP 16 (R.360). On February 4, 1991, the District Court ordered the filing of a RICO Case Statement (R.430), which dramatically changed the character of the litigation before it and quickly, and appropriately, resulted in its termination with prejudice, soon after the RICO Case Statement was filed on March 18, 1991.

The complexity of civil RICO litigation today leads district courts to require plaintiffs to file RICO Case Statements, particularizing their legal allegations and the factual bases for them. This increased specificity facilitates judicial management of such complex litigation and its discovery. Some courts impose the requirement through a standing order. U.S. Dist. Ct. E.D. Wash. Local R. 8. Others impose it case by case, when a particularly complex civil RICO action occurs. Either way, district courts are rightly using the RICO Case Statement with greater regularity.[16]

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[16] *See, e.g., Smith v. Our Lady of the Lake Hosp.*, 960 F.2d 439, 445 (5th Cir. 1992); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Homico Const. & Development Co. v. Ti-Bert Systems, Inc.*, 939 F.2d 392, 393 (6th Cir. 1991); *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 510 (5th Cir. 1990); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1510 (10th Cir. 1990); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1106 (5th Cir. 1990); *Landry v. Air Line Pilots*

The utility of a RICO Case Statement in curtailing abusive RICO suits is manifest, a lesson the District Court below learned when Petitioners filed their RICO Case Statement, which exposed the baseless character of Petitioners' sweeping Complaint. Nationwide, district courts are considering the more definite allegations contained in such statements in deciding FRCP 12(b)(6) motions.[17]

Ass'n Intern. AFL-CIO, 901 F.2d 404, 426 n.75 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990); *Meridan Mort. Corp. v. Spivak*, 1993 WL 193364, *1 (E.D. Pa. 1993); *Cardwell v. Sears Roebuck and Co.*, 821 F. Supp. 406, 407 n.3 (D. S.C. 1993); *W.E. Darin Const. Enterprises, Inc. v. Detroit Coke Co.*, 814 F. Supp. 325, 330 (W.D. N.Y. 1993); *Franks v. O'Connor Corp.*, 1992 WL 301266, *1 (E.D. Pa. 1992); *BML Group, Inc. v. U.S. Pizza, Inc.*, 1992 WL 220946, *1 (E.D. Pa. 1992); *Porter v. Shearson Lehman Bros. Inc.*, 802 F. Supp. 41, 53 (S.D. Tex. 1992); *Halbrecht v. Prudential-Bache Properties, Inc.*, 1992 WL 336757, *10 (D. Conn. 1991); *Chicago Housing Authority v. First Nat. Retirement Services, Inc.*, 1992 WL 168814, *4 (N.D. Ill. 1992); *Jeffreys v. Exten*, 784 F. Supp. 146, 157 (D. Del. 1992); *Albert Einstein Medical Center v. Physicians Clinical Services, Ltd.*, 1991 WL 280274, *1 (E.D. Pa. 1991); *Hunt v. Gouverneur Townhouse Partners-1988, L.P.*, 1991 WL 253126, *1 (S.D.N.Y. 1991); *VSA v. Von Weise Gear Co.*, 769 F. Supp. 1080, 1081 (E.D. Mo. 1991); *Delta Pride Catfish, Inc. v. Marine Midland Business Loans, Inc.*, 767 F. Supp. 951, 968 (E.D. Ark. 1991).

[17] *See, e.g., Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 584 (5th Cir. 1992) (affirming dismissal), *reh. en banc denied*, 985 F.2d 555 (5th Cir. 1993); *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992) (affirming dismissal); *Glessner v. Kenny*, 952 F.2d 702, 712 n.9 (3d Cir. 1991) (affirming dismissal); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991) (affirming dismissal); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 153 (6th Cir. 1990) (affirming dismissal); *O'Malley v. O'Neill*, 887 F.2d 1557, 1559 (11th Cir. 1989) (affirming dismissal), *cert. denied*, 496 U.S. 926 (1990); *Old Time Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1216 (5th Cir. 1989) (affirming dismissal); *Michaels Bldg. Co. v. Ameritrust*

Likewise, courts are finding them useful to clarify issues in the context of summary judgment motions under FRCP 56.[18] This Court ought to use this appeal now to endorse

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Co., N.A., 848 F.2d 674, 677 (6th Cir. 1988) (reversing dismissal); *Cardwell v. Sears Roebuck and Co.*, 821 F. Supp. 406, 407 (D. S.C. 1993) (granting 12(b)(6) motion); *W.E. Darin Const. Enterprises Inc. v. Detroit Coke Co.*, 814 F. Supp. 325, 330 (W.D.N.Y. 1993) (granting 12(b)(6) motion); *Sheperd v. American Honda Motor Co. Inc.*, 822 F. Supp. 629 n.1 (N.D. Cal. 1993) (granting 12(b)(6) motion); *Aloe Coal Co. v. International Union, United Mine Workers of America*, 1992 WL 465768, *3 (W.D. Pa. 1992) (granting 12(b)(6) motion); *Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 668 (E.D. Mich. 1992) (granting 12(b)(6) motion); *Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1492 (D. N.J. 1992) (granting 12(b)(6) motion); *Queen Village Pharmacy, Inc. v. American Federation of State, County and Mun. Employees Dist. Council 33*, 1992 WL 25778, *1 (E.D. Pa. 1992) (granting 12(b)(6) motion); *Jeffreys v. Exten*, 784 F. Supp. 146, 157 (D. Del. 1992) (granting 12(b)(6) motion); *Hunt v. Gouverneur Townhouse Partners-1988, L.P.*, 1991 WL 253126, *1 (S.D.N.Y. 1991) (denying 12(b)(6) motion).

[18] *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 510 (5th Cir. 1990) (affirming summary judgment); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1106 (5th Cir. 1990) (affirming summary judgment); *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 901 F.2d 404, 426, n.75 (5th Cir. 1990) (reversing summary judgment), *cert. denied*, 498 U.S. 895 (1990); *Meridian Mort. Corp. v. Spivak*, 1993 WL 193364, *1 (E.D. Pa. 1993) (granting summary judgment); *Franks v. O'Connor Corp.*, 1992 WL 301266, *1 (E.D. Pa. 1992) (granting summary judgment); *BML Group, Inc. v. U. S. Pizza, Inc.*, 1992 WL 220946, *1 (E.D. Pa. 1992) (granting summary judgment); *Porter v. Shearson Lehman Bros. Inc.*, 802 F. Supp. 41, 53 (S.D. Tex. 1992) (granting summary judgment); *Delta Pride Catfish Inc. v. Marine Midland Business Loans, Inc.*, 767 F. Supp. 951, 968 (E.D. Ark. 1991) (granting summary judgment). Here, too, the Government's suggestion that a RICO Case Statement is (only) "an extension of the pleadings" (Gov. Br. 2-3) is inaccurate.

RICO Case Statements may also be used in assessing whether Rule 11 sanctions should be imposed. *See, e.g., Smith v.*

their use as a method of judicial administration to curtail abusive RICO suits, not only, as here, in the sensitive area of the First Amendment, but also in the area of commercial litigation, where most RICO suits are filed.[19]

Our Lady of Lake Hosp., Inc., 960 F.2d 439, 445 (5th Cir. 1992) (holding district court abused its discretion in imposing Rule 11 sanctions). Such statements, too, usefully focus discovery. *See, e.g., Michaels Bldg. Co. v. Ameritrust Co. N.A.*, 848 F.2d 674, 680 (6th Cir. 1988).

[19] At least three sources may be given as authority for adopting the RICO Case Statement procedure. First, courts cite Rule 11 as giving them authority to compel filing of the RICO Case Statement. For example, a standing order may state on its face that the RICO Case Statement is authorized as "a result of the, reasonable inquiry, required by Fed. R. Civ. P. 11." U.S. Dist. Ct. E.D. Wash. Local R.8. Numerous courts also cite Rule 11 concerns as the motivating factor behind their orders. *See, e.g., Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566, 1582 (S.D. Fla. 1992); *Alexander v. Jenkins*, 1990 WL 98966, *5 (E.D. Pa. 1990); *John L. Motley Associates, Inc. v. Rumbaugh*, 97 B.R. 182, 186 (E.D. Pa. 1989); *Kurz v. Mairone*, 1987 WL 28360, *4 (E.D. Pa. 1987); *R.M. Perez & Associates, Inc. v. Welch*, 1987 WL 10869, *1 (E.D. La. 1987); *Robinson v. Mount Vernon Realty, Inc.*, 1986 WL 22212, *1 (D.D.C. 1986). Second, Rule 12(e) is cited to provide authority for the district courts' actions. *Old Times Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989); *Landry v. Airline Pilots, Ass'n*, 1988 WL 27036, *8 (E.D. La. 1988), *aff'd in part, rev'd in part on other grounds*, 901 F.2d 404 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990). Third, because Rule 16 provides trial judges with broad powers to manage the pretrial process, especially in "potentially difficult or protracted actions that may involve complex issues," courts justify their use of RICO Case Statements as an aspect of their power to control pretrial management. *United Power Ass'n, Inc. v. L.K Comstock & Co.*, 1990 WL 120674, *1 (D. Minn. 1990); *Dictor Capital Corp. v. Feingold*, 1988 WL 34250, *1 (E.D. Pa. 1988). *See generally*, N.Y. State Bar Ass'n Commercial & Fed.

C. Procedural Rules and Equitable Considerations Preclude Petitioners from Repleading.

Equitable considerations preclude Petitioners from repleading at this stage. This appeal does not come to this Court with a quick dismissal after the filing of a single complaint. The litigation extended over nearly five years, with extensive discovery. Petitioners had several opportunities to replead. In addition, they were clearly put on notice that specificity in pleading was required in the RICO Case Statement. Petitioners never asked to replead in response to the motions to dismiss. In fact, at no point in this litigation, have Petitioners asked to replead after being made aware of *all* defects in their complaint – after dismissal in the District Court, in the Court of Appeals, in their petition for certiorari, or in their opening brief in this Court. Dismissal after such extensive proceedings precludes repleading.[20]

Litig. Sec., *The Civil RICO Case Statement* (1989) [*1990*] RICO Bus. Disputes Guide – [CCH] ¶7453 (May 1990). These rules – singularly or in combination – are more than adequate sources of authority for the ordering of RICO Case Statements.

Similar orders are used in the antitrust area. *See, e.g., Von Poppenheim v. Portland Boxing & Wrestling Comm.*, 442 F.2d 1047, 1049-53 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). They are also recommended procedure in the *Manual for Complex Litigation* §21.33 (2d ed. 1985).

[20] *Cf. Moody v. FMC Corp.*, 995 F.2d 63, 66 (5th Cir. 1993) (no amendment allowed after two years of litigation, extensive discovery, expert witnesses hired, trial underway); *Wade v. Hopper*, 993 F.2d 1246, 1249 (7th Cir. 1993) (no amendment allowed; defendants would have been prejudiced if plaintiffs permitted to replead after two prior amendments); *Ashe v. Corley*, 992 F.2d 540 (5th Cir. 1993) (denial of third amendment upheld four years

Moreover, the federal rules of civil procedure bar any repleading by Petitioners. Petitioners did not seek to amend their Complaint before it was dismissed. After the case was dismissed in its entirety by the District Court, Petitioners failed to seek leave to amend after reopening the judgment by way of FRCP 15(a), 59(e) or 60(b), as required.[21] No request was made to replead or for a continuance to pursue additional discovery to supplement the RICO Case Statement. *United States v. Private Sanitation Industry Ass'n*, 995 F.2d 375, 377 (2d Cir. 1993). Leave to amend is subject to the discretion of the district court (*Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971); *Wade v. Hopper*, 993 F.2d 1246, 1248 (7th Cir. 1993)), and that discretion cannot be abused where leave is never requested. *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 881 (1st Cir. 1991); *Carl Sandburg Village Condominium Assn. v. First Condominium Dev. Co.*, 758 F.2d 203, 206 n.1 (7th Cir. 1985). This action, therefore, was properly dismissed with prejudice.

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after original complaint filed); *Browning Ave Realty Corp. v. Rosenshein*, 774 F. Supp. 129 (S.D.N.Y. 1991) (no amendment in RICO action allowed after two years of litigation, discovery extensive, depositions of most principals taken).

[21] *Confederate Memorial Assn. Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993); *Humphreys v. Roche Biomedical Lab. Inc.*, 990 F.2d 1078, 1082 (8th Cir. 1993); *Glenn v. First National Bank*, 868 F.2d 368, 369 (10th Cir. 1989); *Dorn v. State Bank of Stella*, 767 F.2d 442 (8th Cir. 1985); *Wayne Inv. Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 15 (1st Cir. 1984); *Czeremcha v. Intern. Assn. of Mach. & Aero Workers*, 724 F.2d 1552, 1556 (11th Cir. 1984); *Elfenbein v. Gulf & Western Industries, Inc.*, 590 F.2d 445 (2d Cir. 1978).

D. This Case was also Properly Dismissable under FRCP 56 Because Petitioners Presented Discovery and Deposition Material outside the Pleadings in Their RICO Case Statement.

In dismissing the complaint, the District Court extensively relied, not only on the Complaint, but also on the facts set out in RICO Case Statement.[22] While the Court expressly relied on FRCP 12(b)(6) in dismissing Petitioners' action, 765 F. Supp. at 939, the Court was entirely justified in coverting the motion to dismiss under FRCP 12(b)(6) into a motion for summary judgment under FRCP 56(c) and dismissing the case with prejudice because the RICO Case Statement relied on "matters outside of the pleadings."[23]

FRCP 12 requires that "all parties shall be given reasonable opportunity to present all materials . . . pertinent" to the issues when the court converts a FRCP 12(b)(6) motion to a FRCP 56 motion. Moreover, when

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[22] 765 F. Supp. 937, 941 (¶9; J.A. 108) (source of donations), 943 n.4 (¶15; J.A. 112-13 (nature of injury)), 944 n.5 (¶2; J.A. 88 (basis of liability) (Exhibit A)); ¶3; J.A. 89 (other wrongdoers (Exhibit B)); ¶5; J.A. 92-93 (prior criminal convictions); ¶5(g); J.A. 97 (common scheme (Exhibits A & B)); and ¶8; J.A. 107-08 (nature of extortionate activity)).

[23] FRCP 12(b), in pertinent part, provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

parties are "otherwise apprised of the conversion," however, no error is committed by making such a conversion without formal notice.[24] However, the absence of formal notice is excused when it is harmless.[25] Here, of course, Petitioners themselves provided the District Court with a statement of facts that relied on matters outside of the pleadings. They can hardly now contend, as sophisticated litigators, that they were not on notice that the District Court could dismiss the action, if warranted, under Rule 56 or that they did not have a "reasonable opportunity" to present all pertinent material under Rule 12(b).

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[24] 5A C. Wright and A. Miller, *Federal Practice and Procedure* §1366, 506 (1990); *Clark v. Tarrant County*, 798 F.2d 736, 745-46 (5th Cir. 1986) (court's acceptance of material from outside the pleadings was sufficient in itself to notify plaintiffs of the possibility of conversion); *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1430 (9th Cir. 1984) (same); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975) (same). *But see Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); *Powell v. United States*, 849 F.2d 1576, 1577 (5th Cir. 1988).

[25] 5A C. Wright and A. Miller, *supra* §1366, 506 n.26 (1990); *Bell v. Chesapeake & Ohio R.R. Co.*, 929 F.2d 220, 222 (6th Cir. 1991) (affirming summary judgment as failure to notify was harmless error); *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (affirming the summary judgment in part and reversing in part); *Farries v. Stanadyne/Chicago Div.*, 832 F.2d 374, 377 (7th Cir. 1987) (affirming summary judgment even though the district failed to notify parties it was converting 12(b)(6) motion into one for summary judgment under FRCP 56); *Moody v. Town of Weymouth*, 805 F.2d 30, 31-32 (1st. Cir. 1986) (affirming summary judgment because parties were not prejudiced by lack of notice of conversion). *See also Fernandez-Montes v. Allied Pilots Assn.*, 987 F.2d 278 (5th Cir. 1993) (*sua sponte* dismissal was harmless).

This Court is, likewise, not limited by the label affixed to the District Court's judgment,[26] as it recognized long ago in *Romero v. International Term. Co.*, 358 U.S. 354, 357 n.4 (1959) ("[W]e need not restrict our disposition . . . merely because the proceedings below were inartistically labeled.").[27] Accordingly, the action was properly dismissed with prejudice as the granting of a motion for summary judgment on the merits.

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[26] *See generally*, 5A Wright & Miller, *Federal Practice and Procedure* §1366, 497 (1990).

[27] *See Bell v. Chesapeake*, 929 F.2d 220, 222 (6th Cir. 1991) ("[a]s an appellate court, we are not bound to the label attached to the trial court's disposition of the case and may treat it as a summary judgment."). *See also, County Sanitation Dist. No. 2 v. Inland Container Corp.*, 803 F.2d 1074, 1078 (9th Cir. 1986); *Corwin v. Marney, Orton Invs.*, 788 F.2d 1063, 1064 (5th Cir. 1988) (in RICO case, used the summary judgment standard because the district court considered materials outside the pleadings), *appeal after remand*, 843 F.2d 194, *cert. denied*, 488 U.S. 924 (1988); *Downing v. Kunzig*, 454 F.2d 1230, 1231 n.2 (6th Cir. 1972) (court disposed of case, using summary judgment standard, even though the district court "disposed of the case . . . by [a] motion to dismiss" under 12(b)(6), because district court considered affidavits).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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* The able assistance of Marc Haefner (J.D. expected, Notre Dame, 1994), James Scott (J.D. expected, Notre Dame, 1995) and Robert McBride (J.D. expected, Notre Dame, 1995) is hereby acknowledged.